

# MOUNTAIN ADVOCATE.

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## POWERS' DECISION

### As it Appears to a Tennessee Lawyer.

We clip the following from the Knoxville Sentinel, written by Leonidas C. Houk, an able Knoxville lawyer and a member of the distinguished Ed Houk family of Tennessee, which we republish in full:

#### CALEB POWERS' CASE.

Editor the Sentinel: The action of the Kentucky Court of Appeals in granting Caleb Powers, under sentence of death for the alleged murder of William Goebel, a new trial will forever redound to the honor and glory of the proud old Commonwealth. It sheds luster and renown upon Justices Barker and Settle, Democrats, and Burnam and O'Rear, Republicans, the majority of the court concurring in the opinion; and I have not words of condemnation for Justices Paynter, Hobson and Nunn, all Democrats, who dissented from the legal grounds upon which the opinion of the court was based.

The case was reversed solely and wholly upon legal grounds, errors of law and practice both, the merits and facts of the case not being discussed; this being the rule in all Appellate Courts that where there are substantial errors of law and practice, cases are reversed upon those grounds and the facts are not discussed, unless it is manifest that upon the facts as presented there is no case made out. But when a case is reversed upon law points and a new trial is to be had, upon the subsequent trial a very different case may be presented and proved.

It may be stated that this case has been reversed three times. Twice Powers was convicted of being an accessory before the fact to the assassination of Goebel, who was contesting Taylor's election as Governor before the Kentucky Legislature, and sentenced to life imprisonment. Both of these convictions were reversed by the Court of Appeals when that court was composed of a majority of Republicans. The third trial resulted in Powers' conviction and the imposition of the death penalty. This was in August, 1903. He again appealed, but this time to a Democratic court which in the meantime had changed its complexion, and there are now five Democrats and two Republicans composing it.

Jim Howard was also convicted twice of being the man who fired the fatal shot and sentenced to life imprisonment, but an appeal to the court, while it had a majority of Republicans on it, both convictions were reversed. The third time he was convicted and again sentenced for life, and upon appeal to the present court last summer his case was affirmed. Many thought this presaged the affirmation by this court of the Powers case, but thanks to an honest court and an uncorrupted judiciary, their fears were unfounded. The names of the Judges, Democrat and Republican alike, who rendered this opinion will live, and deservedly so, as long as the law books of Kentucky are preserved and courts are in existence.

A singular coincidence has occurred in the event Powers is again tried and convicted. Judge Cantrill, who first tried Powers at Frankfort, has just been elected to the Appellate Court, and should Powers' case come before that court again, Cantrill could not sit upon the case, as he has already expressed the opinion overruling his motion for a new trial on his first conviction.

The majority opinion handed down by Justice Barker, and concurred in by Justices Settle, Burnam and O'Rear, is based mainly upon three grounds: first, because the trial

court erred in refusing to give the defendant time in which to discover and file additional grounds for a new trial; second, because the court pronounced sentence of death on the same day verdict returned in open court; and third, because T. C. Campbell, who assisted in the prosecution, stated as follows in his address to the jury: "Howard was not hung, but eleven of the twelve jurors who tried him were in favor of hanging him and one was for life imprisonment, and the eleven had to come to one."

Taking these reasons up in their reversed order, they are each and all sound and tenable and fully warranted the Appellate Court in reversing the case. First, Campbell's reference to the Howard case was highly objectionable, not germane, and had no relevancy to or connection with the Powers case. There were marks were objected to at the time, and Powers' counsel asked the court to withdraw them from the jury and this he declined to do. There was not, and could not have been legally, any evidence in the case warranting the obnoxious statement; it was a gratuitous declaration, without lawful foundation, in substance and effect conveying incompetent evidence to the jury.

Too many lawyers try to make up in their arguments testimony which they have failed to prove by any witness in the case, and this will not be tolerated in Kentucky any more than it will be in Tennessee, and scores of criminal, and even civil cases, have been reversed here and elsewhere because of improper remarks by counsel. Nobody knows what the effect of an improper and unfounded statement of the character indulged in by Campbell will have upon a jury; and where life is at stake, it will not be tolerated.

On the second ground of reversal: The criminal code of Kentucky says: "Upon verdicts of conviction in cases of felony, the court shall not pronounce judgment until two days after the judgment is rendered, unless the court be about to adjourn for the term." Commenting upon this reason for reversing the case I can do no better than quote the court itself: "Unless we are to hold that section 283 was enacted for no useful purpose, it contains a most solemn and vital right of the accused; its meaning is upon the surface; it requires no reflection to understand it; it was enacted for the express purpose of giving the accused time in which to show cause against the sentence about to be passed upon him. This trial was had during a special term of the court, and it cannot be said that within the meaning of the code the term was about to end, because, having been called for the purpose of this trial alone, it of necessity would not end until that was completed. The jury was through with their labors, and were finally discharged, and there were no other juries to be kept waiting by the delay asked for the accused. The right of a defendant to the two days elapsing after his conviction, and before the infliction of the judgment is fully recognized."

Powers claimed to have discovered new evidence, but was not then in a position to properly present it to the court. The court peremptorily denied this delay and right and immediately sentenced him. This was clearly reversible error.

The reasons assigned in the second ground practically cover the first ground upon which the case was reversed, to-wit: "On the same day upon which the verdict was rendered the applicant was required, over his protest, to file his motion and grounds for a new trial; they were required to be immediately argued by counsel, and were at once overruled by the court. At the time of filing his grounds and motions, the appellant asked for additional time

in which to file further grounds. This request was based upon the facts that his counsel had just finished a long and tedious trial, during which the sittings of the court had been held both day and night; that they were wearied by their prolonged labors, and that a few days' time would enable them to produce additional grounds which they did not then possess, in support of his motion." This reasonable request being denied him, was in itself reversible error.

The dissenting opinion of Justices Paynter, Hobson and Nunn sounds more like a specious, partisan argument than the utterance of grave, dignified justices of a supreme court. They take the position that Campbell's argument did not affect the material and substantial right of Powers and for that reason the case should not be reversed. How they can know that the argument had no effect I fail to see. It is not the actual effect the illegal argument has, but the probable or possible effect it may have. The substantial rights of the accused must not be jeopardized.

They further say that section 283 of the code does not apply in the case as the court had no other business and was about to adjourn. The fact is that special term of court is only "about to adjourn" when the specific business for which it was called is entirely completed, and was not true in this case, as the accused was entitled to reasonable time in which to formulate and present his grounds for new trial. This, in my opinion, was not given him.

These justices also held that the Appellate Court "has no jurisdiction to review the action of the trial court for errors occurring in the con-

sideration of motions for new trials." This, to my mind, is specious and refined reasoning, and are entirely groundless in a case involving life and death. Such a rule might be tolerated in cases involving only property rights, but not so in such cases as this.

(Continued on 4th page.)

## THE OPENING

### Of the Two Colleges on Last Monday Adds New Life to the Town.

Last Monday morning marked the opening again of both of the Colleges of our town.

Union College had closed the first term of the year before the holidays and on Monday again resumed her work with Prof. B. C. Lewis in charge of the Normal Department. This school has a brighter prospect before it than ever before.

At the same time the Barbourville Institute was opened according to previous announcement, with a strong corps of teachers present and a large enrollment considering the fact that this school has been standing idle until now.

Prof. R. E. Warren the newly elected President of this Institute is very enthusiastic in this his new field of labor and the friends and patrons of the school will have cause to be thankful that the Board of Education has been enabled to secure the services of such an able and compe-

tent man to take charge of this work.

Besides the interesting talks from Profs. Warren and Pope, the assembly was permitted to hear interesting talks from Judge J. H. Davis, Judge J. M. Gilbert, Rev. J. V. Daws, Mr. John A. Black, and Mr. John M. Tinsley, after which the enrollment of pupils was begun.

There were about 130 pupils enrolled at the Institute and about 200 at Union College, making in all about 330 students in the two schools on the opening day.

This field is abundantly large to support two good Colleges and we feel that one is a support and a stimulant to the other, and while we feel a deep interest in Union College, we also feel an interest in the Institute, and it is our fondest hope to see both of these institutions built up and made strong.

There is nothing that speaks better for our town than these two schools in active operation, training the young minds in the knowledge of education.

Knox county alone has sufficient children who should to-day be in school, to more than fill both of these schools and yet not enroll one fourth of the list.

We hope to see a feeling of good will exist between the two institutions, and both strive to give to the pupils intrusted to them the best possible advantage of an education, and may the time speedily come when they will both be equipped with large commodious boarding halls where they can accommodate those who wish to attend, and can furnish

board in connection with tuition at reasonable prices.

We wish for both of the schools of our town unlimited and unbounded success.

## CURFEW

### Shall Ring To-Night, by Order of City Council.

#### AN ORDINANCE.

Be it ordained by the Board of Council of the City of Barbourville, that any infant under the age of eighteen (18) years and over the age of seven (7) years, who shall be on the streets, public square, alleys and commons of said city between the hours of 8 o'clock p. m., and 4 o'clock a. m., except such infant be on business and acting under the direction of his father, mother or guardian, or unless such infant shall have a reasonable and proper excuse therefor he shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not less than one dollar and not more than five dollars and the cost of the prosecution for each offence.

It shall be, and is hereby made, the duty of the Marshal of the City of Barbourville, to ring the Curfew Bell at the hour of 7:45 o'clock p. m., each evening, and to arrest all persons under the age of 18 years and over 7 years, who shall be found on the streets, alleys, public square or commons of the said city at or after the hour of 8 o'clock p. m.

This ordinance shall take effect from an after its publication.

H. C. COLE,

Attest: Mayor.  
THOS. D. TINSLEY, Clerk.

## BARBOURVILLE INSTITUTE,

### FIVE DEPARTMENTS

Will Open the First Monday in January, 1905.

Please Read what we can do for you and we will work on a guarantee that YOU GET WHAT YOU PAY FOR if you do your part.

### Collegiate Department,

Prof. R. E. Warren, Principal, late of Georgetown High School, and an honor graduate in the Classical Department of Kentucky State College.

### Normal Department,

Prof. R. L. Pope, Principal, graduate of Kentucky State College and afterwards a student in the University of Virginia. Sixteen years experience in Normal Teaching, Institute work, and six years Professor of Latin and Mathematics in Williamsburg Institute Business Department.

### BUSINESS DEPARTMENT,

Prof. Henry L. Pitman, Instructor, late of Minneapolis Business College will have charge again of this Department.

### Intermediate Department,

Prof. W. E. Faulkner, Assistant Principal of the Barbourville Graded School will be Instructor of this Department.

### Primary Department,

This Department will be under the skillful management of Mrs. J. V. Daws, which fact alone insures success in this Department.

Make it a point to enroll the First Day and you will be enabled to get recitations in any of the following classes:—Any class in regular Primary or Intermediate grades, any class in the Common School course, any class leading up to State Certificate or State Diploma, any class required in the A. B. or B. S. Course, and for the benefit of those who may be irregular or who wish special work, there will be classes in Typewriting, Book-keeping, Shorthand, Commercial Arithmetic, Latin, Greek, German, French, Spanish, General History, Literature, Trigonometry, Geometry, Surveying, Chemistry and Botany.

We cordially invite our patrons and friends to be present on the morning of the opening, January 2, 1905, and request that they continue to visit our class-rooms during the Winter and Spring terms so that they may see the nature of the work.

Board can be furnished to all applicants at the rate of \$2.00 per week. Tuition from \$1.00 to \$2.50 per month, according to grade. Normal Department \$2.00 per month.

Any information will be promptly given by addressing or calling on

R. L. POPE, A. B., Sec'y of the Faculty,  
BARBOURVILLE, KY.